IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 985 of 2004
With
CRIMINAL APPEAL No. 1578 of 2004
With
CRIMINAL APPEAL No. 1911 of 2004
With
CRIMINAL APPEAL No. 1699 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

DHANABHAI @ KALSING KHIMABHAI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

==========

Appearance :

Criminal Appeal No.985 and 1578 of 2004:
MS ROOPAL R PATEL for Appellant(s) : 1,
MS HANSA PUNANI, APP for Opponent(s)

Criminal Appeal No.1911 of 2004
Mr.J.B.Dastoor for the appellant
Ms.Hansa Punani, APP for the opponents.

Criminal Appeal No.1699 of 2005
Ms.Sadhna Sagar for the appellant
Ms.Hansa Punani, APP for the opponents.

==========

CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 24/12/2007

ORAL JUDGMENT

These appeals arise out of a common judgment and order dated 28th May 2004 passed by the learned Additional Sessions Judge, 6th Fast Track Court, Surat.

2. The appellants were the original accused. Appellant in Criminal Appeal No.985 of 2004 was original accused No.1. Appellant in Criminal Appeal No.1578 of 2004 was original accused No.5. Appellant in Criminal Appeal No.1911 of 2004 was original accused No.8. Appellant in Criminal Appeal No.1699 of 2005 was original accused No.7. These accused persons along with others were charged with offences punishable under sections 395 and 397 of the Indian Penal Code. During trial, some of the accused jumped bail and were not available for trial. Present appellants were, however, tried and convicted for offences punishable under sections 395 and 397 of the the Indian Penal Code and were sentenced to undergo rigourous imprisonment for 4 years and 7 years for the said offences respectively. They were also directed to pay fine.

3. Broadly stated, the prosecution case is that on 21.5.99, the accused carrying deadly weapons such as axe, wooden stick, etc. attacked certain residential bungalows of Sanket society in Surat. They broke open the doors of the houses of one Swatantra Bharat Singh, the complainant and Anilkumar Singh, PW-7 and also other houses in the vicinity. They caused injuries to several persons with the help of sticks, robbed the residents of gold and silver ornaments from the bodies as well as by breaking open the cup-boards and also looted cash from the houses.

4. Several witnesses were examined by the prosecution. Test identification parade of all accused was also carried out.

5. Complainant Swatantra Bharat Singh, PW-2 was examined at Ex.72. He stated that the incident had taken place on the night of 20th at about 4 O' clock in the early morning. At 4 O' clock in the morning, two persons were breaking open the front door of the house with an axe. At that time, other persons had broken open another door and entered the house. In all 7 to 8 persons entered into the house. One of them gave a stick blow to him on his nose. His wife came there and told them to take away the ornaments and cash. They asked for cup-board keys. They could give key to one of the cup-boards. Since they did not give the key of other cup-boards, they broke open the door with the help of iron instrument. They also

removed the ornaments from the nose and ears of his wife and daughter. They also looted the ornaments and cash from the cup-board. This went on for about half-an-hour. Till 6 O'clock in the morning, they remained inside the house out of fear. When they came out in the morning, they found that many people gathered at the house of Suresh Singh where also, some damage had taken place. He stated that the persons had robbed him of gold ornaments valuing approximately Rs.36,000. He stated that out of the two persons who entered from the front door, one person had an axe in his hand. The other person had an iron instrument for breaking cup-boards. He had a torch which the assailants had taken away. The witness identified Dhana Kala Khima, accused No.1, before the Court as a person who was carrying an axe. He also identified his companion with iron instrument as accused No.16, Jitu Pardha.

He stated that he could not recognize the other persons except these two since it was dark and there was an atmosphere of terror. He also stated that he had identified these accused persons during test identification parade.

In his cross-examination, he stated that at the time of the incident, there was no facility of street lights. He, however, denied that he had fabricated the story of torch since there was no other source of light. He admitted that in his complaint, he had not stated that out of the two

persons who had entered through front door, one had an axe and another had an iron instrument to break open the cupboard.

6. Though wife of the complainant, Babita Singh was called for the test identification parade, she was not examined as a witness during trial.

7. Mira Singh, PW-4 was examined at Ex.76. She stated that the incident took place at about 2.30 at night. She was sleeping in the hall with other family members. There were two doors to the house. When the second door was being broken, she heard the noise and got up. She saw that about 10 persons entered the house. She, therefore, started shouting. One of the persons carrying stick hit her on the back. Her brother-in-law sent her and his wife inside the house and he himself started resisting the assailants. He snatched away a stick from one of the assailants and started fighting them. Other persons were throwing stones, etc. inside the house. Some of them set tarpaulin sheet on fire by pouring kerosene. She could see some of the persons over there. One of them was wearing a ring in the ear. They had damaged their Tata Sumo car by breaking the diesel tank and the glasses. Her brother-in-law Anil Singh was injured on hand, face, etc. This witness identified accused No.7 Tolsing Shankar and accused N.8, Amariya Chagan before the Court. She was not called for test identification parade because she had gone to her native place at that time.

8. Vibha Singh, PW-5, wife of Anil Singh was examined at Ex.77. She also narrated the incident in somewhat similar fashion. She stated that at about 3 O' clock in the morning, about 8 to 10 persons entered their house. Her husband had fought them. They had broken the light bulb which was outside the house. The assailants had cut off the telephone wires. They ray away at about 5 O' clock in the morning. She stated that since she was inside the room, she had not seen these persons and could not state their age. She could not describe what kind of clothes they had worn nor give any descriptions about the persons.

9. Anilkumar Singh, PW-7 was examined at Ex.80. He stated that he was sleeping with his wife inside the room. His sister-in-law Mira Singh and children were sleeping in the hall. At about 2.30 to 3.00 in the night, in the front room beating had started. His sister-in-law and children started crying. He came out of room and saw that there were 7 to 8 persons. Some more people were standing outside. One of the persons had a stick. Another had an iron implement used for cutting sugar-cane. One more person had an axe. He had no weapon with himself. One of the assailants gave an axe blow to him on the head and one blow on his left hand. He also received injury below his eyes. During this scuffle, he could catch hold of a stick from one of the assailants and he started attacking them with the stick. They,

therefore, ran away and started throwing stones, bricks, etc. Light inside the house was put off. One bulb which was outside the house also broken by these persons with stones. There was a sheet of tarpaulin outside the room. These people carried that sheet near the back door, poured diesel by breaking the diesel tank of his Tata Sumo car and set the sheet on fire. They threw burning sheets towards the house. The incident lasted for about 2½ hours. In the morning, when he came out, nobody was there. The witness identified Amariya Chhagan, accused No.8, Tolsing Shankar, accused No.7 and Badar Abji, accused No.5 before the Court. He, however, could not state as to which accused had given axe blow to him. He also could not state as to which accused had injured his sister-in-law. He stated that about a month after the incident, he was called for test identification parade. He had identified the above mentioned accused before the Executive Magistrate also.

In the cross-examination, he stated that he was not sure whether at the time of the incident power supply had got disconnected or he himself put the light off inside the house. He stated that his partner Ashok Tiwari had returned from U.P. at the night of the incident. He was sleeping in the terrace with his family because in his house there was no light. He admitted that at the time of incident, there was no street light in the area. He admitted that regarding the bulb inside the house and

outside the house, he had not stated before the police.

10. Ashok Tiwari, PW-9, Ex.83, essentially stated that he had heard the noise and could see the assault, but since his wife and children were scared, he did not go to the help of Anil Singh. He, however, was not able to identify any of the accused.

11. Mumtazali Saiyed, PW-19, Ex.108 was the Executive Magistrate who had carried out the TIP. In his deposition, he described the procedure undertaken at that time. He had collected some 32 dummy persons and mixed 6 accused persons at a time. It may be noted that there is hardly any dispute about the fact that test identification parade was carried out in three installments and 6 accused each mingled with 32 dummy persons. It is also not in dispute that at each such identification parade, the dummy persons remained the same and 6 accused changed from time to time.

12. It may be noted that in the first test identification parade exercise, Dhana Kala Khima (appellant in Criminal Appeal No.985 of 2004), accused No.1 was identified by all three persons, namely, Swatantra Bharat Singh, Babita Singh and Anilkumar Singh. Accused No.5, Badar Abji Sarpota (appellant of Criminal Appeal No.1578 of 2004) was identified by Anilkumar Singh in the test

identification parade. Amariyo Chhagan Bhuriya (appellant in Criminal Appeal No.1911 of 2004) accused No.8, was identified by Anil Singh in the second lot of test identification parade. Tolsing Shankar Sarpota (appellant in Criminal Appeal No.1699/05) accused No.7, was identified by Anil Singh in second exercise of test identification parade.

13. It may be noted that panch witness to the test identification parade had, however, turned hostile. It may also be noted that none of the muddamal articles or the weapons allegedly used in the commission of offence were either discovered or recovered during investigation.

14. On the basis of the above evidence, learned advocates appearing for the appellants as well as learned APP Ms.Punani appearing for the State made detailed submissions.

15. It was contended that the identification of the accused persons was not properly carried out. It was submitted that during test identification parade, accused were offered for identification on three separate identification exercises and at each time, the dummy persons had remained the same. It was, therefore, contended that at least the second and third exercise of identification were defective and therefore vitiated. It was contended that identification of the accused before the court after

a long gap of time without any corroboration would be unsafe for basing conviction of the accused. It was contended that there was no source of light which would enable the witnesses to see the faces of the accused and to be able to identify at a later point of time.

15.1 Reliance was placed on a decision in the case of **Mithoo Singh & anr. v. State of U.P.**, 1996 (2) Crimes 182, wherein the learned single Judge of Allahabad High Court finding that the test identification parade was carried out more than 54 days after the incident of dacoity observed that memory is bound to fail and play of imagination is bound to creep in such matters.

15.2 Reliance was also placed on the decision in the case of **Hardial Singh v. State of Punjab**, 1992 Cr.L.J.3140 where the Apex Court finding that the High Court gave the benefit of doubt to some of the accused-assailants since test identification parade was doubtful should also have given such benefit to other accused.

16. It was also contended that no separate charge was framed for two separate incidents of assaults and therefore, the entire trial is vitiated.

17. It was further submitted that from the evidence on record it is not established as to which accused was carrying which weapon or which accused

caused which injury. Under the circumstances, conviction of the accused under section 395 of the Indian Penal Code was not warranted. It was submitted that the aggravated form of robbery or dacoity punishable under section 397 of the Indian Penal Code cannot be applied vicariously. In this regard, reliance was placed on the following decisions:

1. (1996) 2 GLR 251.
2. 1998 Cr.L.J. 1196
3. AIR 1975 SC 905.

18. On the other hand, learned APP Ms.Punani appearing for the State opposed the appeals. She submitted that through reliable eye-witnesses, the prosecution had established the entire incident and that therefore, the Trial Court committed no error in basing the conviction of the accused in the present case. She submitted that even if offence under section 397 of the Indian Penal Code is not made out, on the available material on record, the appellants can still be convicted under section 395 of the Indian Penal Code and the sentence should not, therefore, be altered.

18.1 Reliance was placed on the decision of the Apex Court in the case of **Visveswaran v. State,** AIR 2003 SC 2471 to submit that test identification parade of an accused is not a pre-condition for conviction.

19. From the evidence on record, it can be seen straightway that in so far as the incident of several persons converging in Sanket society on the night of the incident and breaking open the houses and robbing the residents thereof is concerned, there is hardly any dispute. This has been established through reliable cogent eye-witness account in the form of Swatantra Bharat Singh,PW-2 complainant, Mira Singh, PW-4 and Anilkumar Singh, PW-7 as also Ashok Tiwari, PW-9. The accused persons first attacked the house of Anilkumar Singh, broke open his house doors with the help of axe, assaulted the family members residing in the house and also caused injuries to some of them. Apparently, thereafter, the accused broke open the house of Swatantra Bharat Singh, attacked his family members, robbed them of gold and silver ornaments and cash.

20. The question, however, is regarding the involvement of these appellants in the said incident. The entire issue, therefore, boils down to the identification of these appellants during the course of investigation and trial.

21. As noted earlier, the prosecution has relied on the identification of these accused by the witnesses during the test identification parade as well as before the Court during their depositions.

22. A few things which emerge from the evidence

noted herein-above need to be noted at this stage.

(1)There was some darkness, if not total dark condition at the time when the incident took place.
(2)All the appellants were completely unknown to the witnesses.
(3)There was an atmosphere of terror and panic when as many as 15 to 20 assailants converged into the houses of the witnesses armed with axe, iron instrument and wooden sticks.
(4)The witnesses deposed before the Court nearly five years after the incident.

Considering all these aspects of the matter, identification of the accused by the witnesses before the Court *per se* would form a very fickle piece of evidence to involve the accused persons in the commission of crime.

23. One may not, however, lose sight of the following factors.

(1)That the incident lasted for considerable period of time at both the houses. Anilkumar Singh has stated that the incident lasted nearly 2½ hours. Complainant Swatantra Bharat Singh has said that the incident lasted for about ½ hour.
(2)Swatantra Bharat Singh had spoken of a torch which was snatched by the assailants.
(3)Anil Singh stated that there were light bulbs

inside as well as outside the house. This may be somewhat of an improvement from his statement made before the police, however, there is no denial that the assailants had poured diesel from the car of Anil Singh and set tarpaulin sheet on fire. Part of burning sheet was also thrown at the house. The assailants also threw stones from outside the house because Anil Singh had put up some resistance to the assailants. With the help of the light of fire, it would not be impossible for the witness to recognize some of the faces.

(4)Test identification parade was carried out about one-and-a-half months after the incident.

(5)It is not the case of the defence that test identification parade was delayed after the arrest of the accused.

(6)The witnesses all have deposed before the Court in truthful manner, in my assessment. Whenever it was not possible for some of the witnesses, they have stated that they were not in a position to identify any of the accused persons.

(7)None of the witnesses had any grudge or previous enmity with the accused persons.

In above view of the matter, test identification parade to the extent the same was validly and legally carried out would form an important basis to find out as to whether the accused persons were involved in the incident or not.

24. As noted earlier, during identification parade, 32 dummies were collected. Accused persons who were in all 18 in number were mingled with the dummies in group of 6 accused at a time. Admittedly, after the first exercise of identification parade was over, the dummies were not changed and only 6 accused persons were changed and replaced. This was repeated for the third exercise of identification also. In that view of the matter, when the witnesses were asked to identify the accused on the second and third occasions, they had already sufficient opportunity to recognize the dummies. Since only 6 accused persons were changed at each successive identification exercise, that made the task of the witnesses that much easier to spot the new faces and to eliminate those dummies who are already earlier paraded. In that view of the matter, I find considerable force in the submission of the counsel for the appellants that at least insofar as the second and third identification exercises are concerned, there was material irregularity which could substantially dilute the identification of the accused by the witnesses. In that view of the matter, identification of the accused in the second and third exercise would be rendered meaningless.

25. Insofar as first identification exercise was concerned, I however, find that the same was quite in order. The Executive Magistrate had in detail explained the procedure adopted. As many as 32 dummies were collected. 6 of the accused were offered

to stand at the place of their choice and witnesses were called to identify them. During this identification parade, all the three witnesses, i.e. Swatantra Bharat Singh, Babita Singh and Anil Singh identified Dhana Kala Khima accused No.1. Though Babita Singh was not examined as a witness before the Court, identification of this accused would not stand vitiated primarily since he was identified by other two witnesses also. These witnesses had subsequently before the Court also identified this accused as one of the assailants.

26. Accused No.5, Badar Abji Sarpota was also identified by Anil Singh during the test identification in the first batch. It is true that the other two witnesses, namely, Swatantra Bharat Singh and Babita Singh could not identify this accused during the test identification parade, nevertheless, he was identified by Anil Singh. I find that Anil Singh had the maximum opportunity to see the faces of the assailants to be able to recognize them. He is the one who had put up resistance against the aggressors. He had fought back the assailants and had partially succeeded in driving them out of his house. Stung by the temporary reverse, the assailants had started throwing stones and bricks on his house. They had also set tarpaulin sheet on fire by using the diesel from the car lying outside. The incident went on for a fairly long time. As per Anil Singh, it lasted for about 2½ hours. The light caused by fire would certainly

enable the witness to see the faces of the accused. Identification of this accused, therefore, remains unshakable. Significantly, he was also identified by witness Anil Singh before the Court.

27. As noted earlier, the witness had no previous enmity with the accused. Their depositions before the Court seem forthright and honest. Whenever they were unable to identify the accused or remember their faces, they have stated so. In light of these circumstances, identification of Dhana Kala Khima, accused No.1 during test identification parade by the participating witness, particularly by Swatantra Bharat Singh and Anil Singh and his subsequent identification before Court by the witness by Swatantra Bharat as well as identification of Badar Abji Sarpota, accused No.5 by Anil Singh during the test identification parade and his subsequent identification before the Court would render sufficient basis to conclude that these two accused had participated in the crime.

28. Insofar as other accused are concerned, however, it would be extremely unsafe to place their conviction on the basis of the available material on record. As noted, these accused were identified during test identification parade in second and third batch, by which time, witnesses had sufficient opportunity to recognize the dummies by virtue of their repetition. In absence of any valid test identification parade, for the reasons already

discussed, identification of these witnesses before the Court for the first time after a gap of nearly 5 years would not provide for safe basis for their conviction.

29. Involvement of accused No.1, Dhana Kala Khima and accused No.5, Badar Abji thus stands proved.

30. In case of Mithoo Singh & anr. v. State of U.P. (supra) the learned Judge was rendering a judgment in the peculiar facts of the case. The learned Judge found that there was failure of memory which was reflected also on the bad performance of the witnesses. The observations therein, therefore, would not apply to the facts of the present case.

In the case of Hardial Singh v. State of Punjab (supra) the Apex Court found that the High Court had observed that there is every possibility of the witness committing mistake in identifying the assailants. It was on this background and on the basis of which, evidence of eye witnesses was rejected in respect of 4 other accused, there is no reason why the same coulc be relied upon in respect of the appellant. In the present case, I have already dealt with the question of identification of accused No.1, Dhana Kala Khima and Badar Abji, accused No.5 during test identification parade as well as before the Court. The cases are vitally different from

other appellants. These accused therefore cannot get the benefit of doubt which the other appellants have received.

31. I am equally unable to accept the contention of learned APP that in the present case without identification parade or identification before the Court also, it would be possible to convict the accused. In case of Visveswaran v. State (supra), the Apex Court had convicted the accused of rape without any identification during the test identification parade in the background of the facts that the victim was raped in a hotel room and the room was booked by the accused and he was unable to explain his whereabouts at the time of commission of offence. In the present case, however, when large number of persons who were earlier not known to the witnesses had at the dead of the night attacked their houses, their identification was absolutely vital.

32. So far as involvement of Dhana Kala Khima, accused No.1 and Badar Abji, accused No.5 is concerned, the same does stand established. Their conviction under section 395 of the Indian Penal Code is thus fully justified. Conviction and sentence under the said section is thus sustained.

33. Learned advocates for the appellants, however, submitted that the accused could not have been convicted under section 397 of the Indian Penal Code since it is not established as to what weapon

these accused were carrying and what hurt these accused, if at all, caused. Though complainant Swatantra Bharat Singh stated in his deposition that accused No.1 was carrying an axe, he agreed in the cross-examination that he had not so stated before the police. So far as accused No.5 is concerned, he is not said to have been carrying any particular weapon. In view of the above and on the basis of the evidence on record, it cannot be said to have been established that these accused were carrying any particular weapon or they had caused any injury to any of the inmates of the houses while committing dacoity. Their conviction under section 397 of the Indian Penal Code, therefore, was not justified. By series of decisions, some of which are noted hereinabove, it is now well settled that section 397 of the Indian Penal Code cannot apply by way of vicarious liability and only such offender/offenders who is shown to have used any deadly weapon or caused grievous hurt to any person or attempted to cause death or grievous hurt to any person can be sentenced under section 397 of the Indian Penal Code.

34. Section 394 of the Indian Penal Code, however, reads as follows:-

> “394. If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for life, or with rigourous imprisonment for a term which may extend to ten

years, and shall also be liable to fine."

From the available material on record, it can be seen that while committing robbery, hurt was voluntarily caused by some of the members of the group. In that view of the matter, all persons jointly concerned in committing or attempting to commit such robbery are liable to be punished with imprisonment for life or with rigourous imprisonment for a term which may extend to ten years. Under the circumstances, though conviction of accused No.1 and 5 under section 397 of the Indian Penal Code cannot be justified, they can be appropriately convicted under section 394 of the Indian Penal Code in addition to section 395 of the Indian Penal Code. It is true that charge under section 394 was not framed. However, there was sufficient evidence on record and no prejudice is demonstrated by the accused in their defence. Charge under section 397 of the Indian Penal Code is an aggravated form of dacoity and even if that charge is dropped, accused cannot escape the liability under section 394 of the Indian Penal Code.

35. In the result, in so far as accused No.1, appellant in Criminal Appeal No.985 of 2004 and accused No.5, appellant in Criminal Appeal No.1578 of 2004 are concerned, their conviction and sentence under section 395 of the IPC is confirmed. Their conviction and sentence under section 397 of the Indian Penal Code is converted to one under section 394 of the Indian Penal Code and the sentence shall remain unaltered.

In so far as accused No.8, appellant in Criminal Appeal No.1911 of 2004 and accused No.7, appellant No.1699 of 2005 are concerned, they are acquitted by giving them benefit of doubt. Their appeals shall stand accordingly allowed. They shall be released forthwith if not required in any other criminal case.

(Akil Kureshi, J.)

(vjn)